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NO. 83-6608

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

HENRY WILLIS, III,

Cross-Petitioner,

v.

WALTER D. ZANT, WARDEN,

Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE CROSS-RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for
Cross-Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTIONS PRESENTED

1.

Was the use of peremptory challenges by the district attorney constitutional in the instant case?

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PART ONE

STATEMENT OF THE CASE

Cross-Petitioner, Henry Willis, III, was convicted of murder in January, 1978, in the Superior Court of Bleckley County, Georgia. Cross-Petitioner was sentenced to death after a trial by jury. The conviction and sentence were affirmed by the Supreme Court of Georgia on direct appeal and certiorari was denied by this Court. Willis v. State, 243 Ga. 185, 253 S.E.2d 70, cert. denied, 444 U.S. 885 (1979).

A subsequent petition for a writ of habeas corpus was filed in the Superior Court of Tattnall County, Georgia. Said petition was denied on August 29, 1980. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on November 13, 1980. A subsequent petition for a writ of certiorari was denied by this Court. Willis v. Balkcom, 451 U.S. 926 (1981).

Cross-Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia. On April 29, 1982, the magistrate entered a report and recommendation denying habeas corpus relief. The findings of fact and conclusions of law made by the magistrate were adopted by the district court on September 21, 1982.

Petitioner then appealed to the United States Court of Appeals for the Eleventh Circuit from the denial of habeas corpus relief. On November 17, 1983, A panel of that court entered an order directing that the district court conduct an evidentiary hearing on two specific issues. Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983). Cross-Respondent Zant filed a petition for rehearing and a suggestion for rehearing en banc challenging that decision. On December 20, 1983, rehearing was denied. Warden Zant then filed a petition for a writ of certiorari challenging the decision of the United States Court of Appeals for the Eleventh Circuit. Cross-Petitioner Willis filed a response in opposition to that petition and filed the instant cross-petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT ON THE CROSS-PETITION

I. THE DISTRICT ATTORNEY'S USE OF PEREMPTORY CHALLENGES WAS CONSTITUTIONAL.

Cross-Petitioner has urged this Court to grant a writ of certiorari to consider whether Swain v. Alabama, 380 U.S. 202 (1965) should be reversed and some stricter control on the use of peremptory challenges implemented. Cross-Respondent would urge this Court to deny the writ as requested by the Cross-Petitioner, but grant the writ on the issues presented by the initial petition.

As noted in the initial petition, this Court has long recognized that a criminal defendant is not constitutionally

entitled to have a person of his own race on the jury that tries him. Apodaca v. Orkin, 406 U.S. 404 (1972). Under Georgia law, all attorneys are entitled to exercise peremptory challenges at their own discretion. Cross-Petitioner has not challenged the constitutionality of that Georgia code provision. Thus, only by finding that code section unconstitutional may an inquiry be made into the thought processes behind a prosecutor's use of his peremptory challenges.

Cross-Respondent suggests that this Court should not grant the writ based on the position urged in the cross-petition. The prosecutor should continue to be presumed to act in a constitutional matter. Furthermore, an inquiry should not be made into an attorney's thought processes in attempting to obtain the best jury possible. If Cross-Petitioner's argument were adopted, then surely a defendant should also be precluded from excluding persons on the same basis. Cross-Respondent submits that the position asserted by the Cross-Petitioner amounts to an unreasonable intrusion into an attorney's decision making process and an attorney's tactical or strategic decisions. The courts have generally been reluctant to make such an inquiry into counsel's actions at trial. Cross-Respondent submits that this Court should also refrain from making such an inquiry under the circumstancs of the instant case. The mere fact that blacks may happen to be excluded from the jury panel is clearly insufficient to find any type of constitutional violation. This is particularly true in the instant case where the Cross-Respondent has noted in the original petition that there were obvious reasons for the excusal of these prospective jurors.

Cross-Respondent submits that the writ as suggested by the Cross-Petitioner should be denied as an undue intrusion into the use of peremptory challenges. This case is simply not one in which the prosecutor has announced an intent to obtain an all-white jury or announced that he intends to do so in every

case, unlike the examples set forth in the cross-petition. This is also not a situation such as that in Ex parte Virginia, 100 U.S. 339 (1880). In that case, a judge was specifically excluding blacks from even having the opportunity to serve on juries. In the instant case, blacks have the opportunity to serve on a jury. The prosecutor here simply utilized his peremptory strikes and it happened that all of the blacks were excluded. The fact that a prosecutor is a state official should not deprive the prosecutor of the opportunity to utilize his peremptory challenges in the manner he sees fit in order to obtain an impartial jury. Thus, contrary to the assertions of the Cross-Petitioner, this is not a case justifying the reversal of Swain v. Alabama, at least not on the basis asserted by the Cross-Petitioner.

Therefore, Cross-Respondent submits that the instant cross-petition should be denied as presenting no constitutional issue which would justify the Court granting Cross-Petitioner's application for the writ.

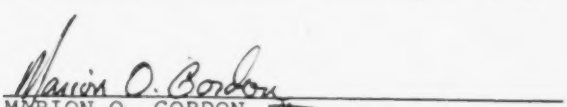
CONCLUSION

For all of the above and foregoing reasons, Cross-Respondent respectfully requests that this Court deny the cross-petition for a writ of certiorari filed on behalf of Henry Willis, III, but grant the initial petition for a writ of certiorari filed on behalf of Walter D. Zant.

Respectfully submitted,

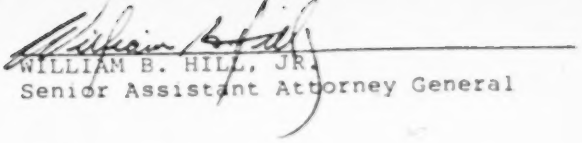
MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General



MARION O. GORDON
First Assistant Attorney General

(Signatures continued)



WILLIAM B. HILL, JR.
Senior Assistant Attorney General

MARY BETH WESTMORELAND
Assistant Attorney General

MARY BETH WESTMORELAND
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Cross-Respondent upon the Cross-Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

Joseph M. Nursey
Millard C. Farmer
P. O. Box 1978
Atlanta, Georgia 30301

This 22nd day of May, 1984.

Mary Beth Westmoreland
MARY BETH WESTMORELAND
Assistant Attorney General